VIRGINIA LAW REGISTER

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The States and the Corporations.

The States are to be congratulated upon the decision handed down by the Supreme Court of the United States on November 3rd, in which the Massachusetts Foreign Corporation Tax Law of 1909 has been sustained. The Chief Justice and JJ. Van Devanter and Pitney dissented, Justice Day delivering the opinion of the court.

The Massachusetts law provides that every foreign corporation shall pay annually an excise tax of one-fiftieth of 1 per cent. of its authorized stock. Justices Day, Holmes, McKenna, Lurton, Hughes, and Lamar interpreted this to mean almost the same as the Federal Corporation Tax Law, which avoided previous errors by careful phraseology. They held that this meant a tax on the privilege of doing business within the State not a tax on the property of the corporation outside the State.

Although no dissenting opinion was delivered, the report was current during the day that the dissenting members of the court held the case to be virtually identical with the Western Union and Pullman cases from Kansas, wherein a Kansas tax on foreign corporations was held unconstitutional a few years ago. Justice Day directed much of his argument to this point.

He said the Kansas cases involved taxes upon capital stock representing property both in and out of the State, the law thus imposing a burden on interstate commerce. He pointed out the the business of the Western Union and the Pullman Company was commerce, while in the two cases decided today the business of one company was mining and the other manufacturing, only incidentally connected with interstate commerce. He said that the Massachusetts law was not to be interpreted as taxing interstate commerce, or as applying to foreign corporations engaged wholly in interstate commerce.

This decision, which we hope to report in full, is one which not only affords an excellent method of raising revenue, but also puts within the power of the States some way by which foreign corporations may be compelled to stand on the same footing with domestic ones. It has been a strange anomaly in the law that too often the foreign corporation was given a distinct advantage over a domestic one, both in the matter of taxation and regulation. Simon Peter, had he lived unto the present time, might not so readily have answered his Master's question, "Of whom do the kings of this earth take tribute or custom?" but have drawn a distinction between the individual and the corporation. Neither the stranger nor the children escape now-a-days, though at one time it looked very much as if the answer would have had to have been just the opposite to what it was.

What Are "Necessitous Circumstances?"

Section 3786b of the Virginia Code prescribes a punishment for any husband who shall "without just cause desert or wilfully neglect to provide for the support of his wife or minor children in destitute or necessitous circumstances." What are "necessitous circumstances" our Court of Appeals has held is a question for the jury and must depend upon the surroundings and social standing of the parties. See Burton's case, 108 Va., and Draper *v.* Commonwealth, decided Sept. 11th, 1913.

Now two questions of construction arise under this statute: Suppose the husband without just cause desert his wife, the wife being in comfortabie circumstances. Is he guilty of any offense under the statute, or is desertion a crime only when the wife is poor and no crime when she is rich? Were the words "in necessitous circumstances" intended to apply to both desertion and wilfully neglecting to provide, or only to the latter? "Desertion" doesn't have to be "wilfull," nor does "failure to provide" be "without just cause," it seems from the reading of the statute, and yet did not the Legislature intend to punish "wife desertion" independently of the condition of the wife?

And yet a monetary consideration can be taken in lieu of imprisonment if the deserted or unprovided wife consent and the

court is so disposed. This would look as if "desertion and neglect to provide" was intended by the lawmakers. And yet if the husband does not desert his wife but wilfully neglects to provide for her, she being in destitute or necessitous circumstances, is not he guilty under the statute?

And the question arises, what constitutes "necessitous circumstances?" In the case of Draper *v.* Commonwealth, *supra,* the lower court refused to give an instruction holding that a husband cannot be found guilty of non-support of his wife when after a separation between them caused by his misconduct the wife takes service and supports herself. In other words, that such action on the part of the wife operates a condonement of the offense. Our Supreme Court of Appeals approved this action of the lower court, Judge Whittle remarking that "to state the proposition is to answer it." So we have the opinion of our Supreme Court settling the fact that a woman who is self-supporting by her own labor is held to be in necessitous circumstances, and we think correctly so. The Century Dictionary defines "necessitous" "pressed by poverty; unable to procure what is necessary for one's station." A wife is certainly pressed by poverty when she has to go to work to support herself. Is not a lady "in necessitous circumstances," according to the definition, if she is left without such food and clothes as her station in life require, although she may have food to keep her alive and raiment sufficient to hide her nakedness? We confess we are at a loss to construe this statute and think our law-makers ought to clear it up or repeal it. Wife desertion ought to be made a crime, no matter what the means of the wife may be, and neglect to provide for a wife, when wilfull, ought to be punished, no matter what her station in life may be.

A Warning to Newspapers.

We have several times commented upon the severe but most excellent law in England as to publication in newspapers concerning criminal trials. We have no such statute in any of the States of which we are aware. But the staid old State of Massachusetts has lately, through its Supreme Court, promulgated a decision which should require the careless reporter to "sit up and take notice," although in this case

the publication related to was made the subject of a libel suit. In Sweet *v.* Post Pub. Co., 102 N. E. 660, the Post Publishing Company was held liable in damages to the plaintiff for publishing a paragraph in which it was stated that the plaintiff had been indicted by the grand jury. The fact was that a man named Sweet had been indicted, but not the plaintiff. The defendant plead that it was a privileged communication and that it had exercised reasonable care and diligence in trying to ascertain the truth of the report before publishing it. But the court said:

"The investigation and report by the grand jury constituted a judicial proceeding, and, in the absence of express malice, a fair and correct report of it by the defendant in the newspaper published by it was privileged. . . . The privilege attaching to such reports rests, however, upon a somewhat different ground from that on which privileged communications between private persons rest. In them the person making the communication has an interest to protect or a duty to perform, or his relation to the party to whom the communication is made is of a confidential nature, and the law holds that in such cases, if what is said or written is communicated in good faith, in the belief that it is true, and with no malevolent motive and for the purpose of protecting or promoting his interest, or in the performance of a duty incumbent upon him, social or legal or moral, and is justified or required by the nature of the relations existing between him and the person to whom the communication is made, and does not go beyond what is fairly warranted by the occasion, the communication is privileged. But no duty rests upon the publishers of newspaper to report judicial proceedings, and their interest in such matters is only that which all the rest of the community has. It is for the interest of every one that crime should be detected and punished, and everyone has the highest interest in whatever pertains to the proper administration of justice. It is upon these grounds that reports of judicial proceedings fairly and correctly made are privileged. . . . In order to be privileged such reports must be not only fair and impartial, but they also must be accurate. The same principle which requires that they should be fair and impartial requires that they should be accurate, at least in regard to all material matters. . . . A distorted report cannot in the nature of things form the basis for a correct judgment. In a sense it may make no difference to the public, so far as the course of judicial proceedings is concerned, whether it is

> John Smith or John Jones who is arrested. But the administration of justice would be a farce or worse than a farce if the guilty escaped and the innocent were punished, or if the rights of parties were determined in a manner in which according to plain principles of justice they should not be. It is of the highest consequence, therefore, in order to enable the public to judge rightly, that a report of judicial proceedings should be not only fair and impartial but should be accurate also."

So it behooves the reporter hereafter to verify his statements and to exercise something more than ordinary care when he states anything which tends to bring a person into disrepute concerning a criminal charge.

We have always thought the English courts went a little too far in Hutton *v.* Jones (15 VA. LAW REGISTER, p. 810), but the good name and fame of the individual is too much at the mercy of the ordinary reporter to allow any relaxation of the admirable rule laid down by the Massachusetts Supreme Court. Its opinion is unanswerable.

The Last Bar Examination.

We congratulate the Board of Examiners upon the series of questions which composed the last examination and which we publish in this number. They are eminently fair to the student and of a character which tests in an excellent way the fitness of the applicants. This is as it should be, and no one who fails upon an examination of this character has a right to complain. To test applicants with knotty questions upon cases some of which have puzzled eminent courts, to ask catch questions and try to confuse instead of elucidate, is neither just to the profession nor the applicant. In our judgment the applicant should show a knowledge of fundamental principles, should be able to apply them to cases not of too complex a character, and evince an acquaintance with pleading such as to enable him to commence practice. A system of marking not too rigid in its nature should be adopted, so as to give the examiners some leeway; otherwise our examinations become like those of the Chinese students, where memory plays a greater part than knowledge and a parrot-like proficiency is considered superior to judgment.

Migratory Birds as Engaged in Interstate Commerce—Hunters Had Better Take Notice.

We wonder what an old gentleman named P. Henry, or another venerable man yclept J. Madison—not to speak of T. Jefferson—would have said had the Federal Congress in 1795, for instance, attempted to pass a law punishing a citizen of one of the sovereign States of the Union for shooting reed birds out of season, or wild duck before sunrise or after sunset, or who killed a song bird. And yet the strong arm of the Federal Government has now in the year 1913 taken the migratory birds of the country under its protection and woe to the luckless hunter who knowing or unknowing the law violates it.

We are in entire sympathy with the object proposed to be attained by the new law, which was signed on October 1st by President Wilson, a Jeffersonian Democrat, but we are completely at a loss to understand under what clause of the Federal Constitution its passage was justified. It protects migratory birds and therefore we suppose considers them as engaged in interstate commerce and thus a subject for Federal legislation. Under no other clause of the Constitution can we imagine that the Congress could claim any right to say to a citizen of Virginia that he should not upon his own land in Virginia shoot a song bird, or a reed bird out of season, or a wild duck before sunrise or after sunset. It may look like, and it is, an excellent law in itself and every State should have such a law, but it does seem to us a very far reaching and dangerous exercise of the Federal Governmental power. We do not believe it constitutional and hope to see it reach the Supreme Court of the United States—not to test the wisdom of such legislation when enacted by proper authority, but to test the right of the Congress to pass such a law and the President to promulgate "orders" concerning it.

In the mean time we advise every man who shoots to write to his representative for a copy of the law and the executive orders issued in pursuance thereof and govern himself accordingly, unless he wishes to make a test case.